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No. 96-608

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
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RANBIR S. SAHNI, PETITIONER

v.

AMERICAN DIVERSIFIED INVESTMENT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly concluded that 12 U.S.C. 1821(j) barred the court from exercising jurisdiction on petitioner's behalf to rescind a sale by the Federal Deposit Insurance Corporation (FDIC), as receiver, of certain limited partnership interests owned indirectly by a failed savings bank in the course of the FDIC's liquidation of the bank's assets.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is reported at 83 F.3d 1054. The orders of the district court dismissing petitioner's complaint (Pet. App. 18a-20a) and denying petitioner's motion for reconsideration (Pet. App. 15a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1996. A petition for rehearing was denied on July 18, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on October 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the late 1970s, petitioner formed and was the sole general partner of more than 50 limited partnerships, each created for the purpose of building apartment projects financed by the Department of Housing and Urban Development (HUD Partnerships). In 1983, petitioner acquired Tokay Bank, which he intended to merge with another of his corporations to form American Diversified Savings Bank (ADSB), a California-chartered, federally insured savings and loan. California banking authorities, however, required that petitioner first divest his general partnership interests in the HUD Partnerships. Consequently, at the same time that he formed ADSB, installing himself as Chairman and CEO,[1] petitioner (i) formed American Diversified Investment Corporation (ADIC), as ADSB's wholly owned subsidiary; (ii) formed American Diversified Partners (ADP), a new limited partnership, making ADIC general partner and himself sole limited partner; and (iii) substituted ADP as general partner of the HUD Partnerships. Pet. App. 5a.

In 1986, ADSB was declared insolvent and was placed in conservatorship; by 1989, the Federal Deposit Insurance Corporation (FDIC) had become ADSB's receiver.[2] Shortly thereafter, litigation

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[1] Petitioner's involvement with ADSB was noted in *O'Melveny & Meyers* v. *FDIC*, 114 S. Ct. 2048, 2051-2052 (1994) ("Sahni and [ADSB President] Day * * * fraudulently overvalued ADSB's assets, engaged in sham sales of assets to create inflated 'profits,' and generally 'cooked the books' to disguise the S&L's dwindling (and eventually negative) net worth.").

[2] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103

arose between petitioner and the banking agencies. In 1990, the parties entered into a comprehensive settlement agreement, under which petitioner was required to make a substantial payment to the FDIC. With the exception of certain assets not relevant to this case, all ownership interests in ADSB and its controlled entities were transferred to the FDIC for liquidation. Petitioner retained a one percent interest in the distributive share of ADP partnership income. Pet. App. 6a.

Between 1990 and late 1991, the HUD Partnerships and ADP's general partnership interests therein were sold as part of the FDIC's liquidation of ADSB's assets. In 1991, the FDIC offered a bulk sale of ADP's remaining general partnership interests. Those interests were offered in combination with notes from loans made to the HUD Partnerships by ADSB, now payable by the HUD Partnerships to the FDIC. The FDIC was listed as the seller on those purchase agreements. Pet. App. 6a.

In February 1993, petitioner instituted five actions in state court against ADP, ADIC and the third-party purchasers, seeking to rescind the FDIC's sale of the HUD Partnership interests. After the cases had been consolidated, the FDIC intervened, removed the consolidated cases to federal court, and moved to dismiss for lack of subject-matter jurisdiction under 12

Stat. 83, abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board, and provided for the FDIC's succession to FSLIC's function as receiver of failed thrifts.

U.S.C. 1821(j). Pet. App. 6a.[3] The district court dismissed the case on that ground (*id.* at 18a-20a), and it denied petitioner's motion for reconsideration (*id.* at 15a-17a).

2. The court of appeals affirmed. Pet. App. 3a-14a. Initially, it found that the FDIC met the constitutional requirements for standing to intervene in this matter, because the FDIC, a party to all of the HUD Partnership sales, faced injury directly traceable to petitioner's request for rescission, namely loss of the sales, potential liability to the purchasers, and a chilling effect on future sales of ADSB assets. *Id.* at 8a. The court also concluded that the prudential requirements for standing were satisfied, since the FDIC was asserting its own rights as receiver of ADSB, and its right to liquidate ADSB's assets is protected by Section 1821(d) and (j). *Ibid.*

Next, the court rejected (Pet. App. 10a) petitioner's contention that the FDIC was not protected by Section 1821(j) because the FDIC was not acting as receiver, but rather as general partner of ADP, when it sold the HUD Partnership interests. *Id.* at 11a. The court recognized that the assets sold by the FDIC were part of the receivership estate by virtue of the chain of ownership: "(1) ADSB owned American Diversified Investment Corporation (ADIC); (2) ADIC was the general partner of American Diversified Partners (ADP); (3) ADP owned the HUD

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[3] Section 1821(j) provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver.

partnerships; (4) Therefore the HUD partnerships were the assets of ADSB." *Id.* at 11a & n.3. Since the FDIC acted "well within its broad statutory powers as receiver when it sold the HUD partnerships," the court concluded, Section 1821(j) "bars the remedy of rescission sought by [petitioner]." *Id.* at 12a.

Finally, the court of appeals rejected petitioner's contention that the FDIC violated Section 15509 of the California Corporations Code by failing to obtain petitioner's consent to the sales. Pet. App. 12a-13a.[4] The court concluded that the consent requirement was preempted by Section 1821(d)(2)(G)(i)(II), which authorizes the FDIC, as receiver, to "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer."

ARGUMENT

1. Petitioner argues (Pet. 3-5) that Section 1821(j) does not bar his action for rescission in this case because (he asserts) the HUD Partnership interests were not ADSB receivership assets and the FDIC did not act as ADSB's receiver in selling them. That argument is without merit.

Petitioner does not dispute that, under state law, ADSB itself could have sold the HUD Partnership interests, exercising its control over its wholly owned subsidiary corporation, ADIC, which is in turn the general partner of ADP. Pet. 4-5. In light of the

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[4] Section 15509 provides in pertinent part that "[a] general partner shall * * * without the written consent or ratification of the specific act by all the limited partners * * * have no authority to * * * [d]o any act which would make it impossible to carry on the ordinary business of the partnership." Cal. Corp. Code § 15509(1)(b) (West 1991).

unbroken chain of ownership and control running from ADSB through ADP, the HUD Partnership interests were correctly viewed as assets within the ADSB receivership estate for liquidation purposes. See *In re Landmark Land Co. of Oklahoma, Inc.*, 973 F.2d 283, 287-290 (4th Cir. 1992) (where receiver's wholly owned subsidiary controls another entity which owns assets, such control, either as majority shareholder or general partner, is tantamount to ownership of controlled entity's assets for liquidation purposes); *Bender* v. *CenTrust Mortgage Corp.*, 833 F. Supp. 1540, 1542 (S.D. Fla. 1992) (assets of wholly owned subsidiary "are assets of CenTrust Bank" and court lacked jurisdiction to enjoin their liquidation because "it is evident that FIRREA empowers FDIC to sell a failed institution's assets, whatever they may be, free from interference by the Courts") (quoting *Gosnell* v. *FDIC*, Civ. No. 90-1266L, 1991 WL 533637, at *5 (W.D.N.Y. Feb. 4, 1991), aff'd, 938 F.2d 372 (2d Cir. 1991)), aff'd, 51 F.3d 1027, modified on other grounds on rehearing, 60 F.3d 1507 (11th Cir. 1995).[5] We are aware of no authority to the contrary.

Petitioner's contrary view—that the FDIC has no authority as receiver with respect to the HUD Partnership interests because they are directly owned by "separate and distinct" entities (Pet. 5)—ignores

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[5] Cf. *SEC* v. *American Capital Investments, Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (SEC receiver's conveyance of title to property of controlled partnership upheld as "a conclusion firmly rooted in the common law of equity receiverships"); *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1405 (9th Cir.) (SEC receivership included all assets and property controlled by subsidiaries and by limited partnership whose general partner was subsidiary), cert. denied, 506 U.S. 873 (1992).

Congress's intent through FIRREA "to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 330 (1989). Congress has empowered the FDIC as receiver to "take over the assets * * * and conduct all business of the institution," "collect all obligations and money due the institution," and "preserve and conserve the assets and property of such institution," 12 U.S.C. 1821(d)(2)(B)(i), (ii) and (iv); "to realize upon the assets of the institution," 12 U.S.C. 1821(d)(2)(E); and to "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent," 12 U.S.C. 1821(d)(2)(G)(i)(II). Where, as here, a failed bank holds significant assets through wholly owned subsidiaries created precisely for that purpose, the FDIC's receivership powers are reasonably interpreted to encompass such assets.

2. Petitioner argues (Pet. 5-6) that the FDIC's sue-and-be-sued clause, 12 U.S.C. 1819(a), provides a waiver of sovereign immunity that permits equitable relief—such as rescission—against the FDIC in the exercise of its statutory powers. That is incorrect. Irrespective of sovereign immunity, Section 1821(j) bars the courts from "*tak[ing] any action*, except at the request of the Board of Directors by regulation or order, *to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver*." 12 U.S.C. 1821(j) (emphasis added). Every court of appeals that has addressed the matter has understood that plain language to preclude the courts from restraining the FDIC as receiver when disposing of bank assets in furtherance of its statutory

liquidation powers.[6] Rescission is treated no differently than an ex ante injunction in that regard. See *Ward* v. *RTC*, 996 F.2d 99, 103 (5th Cir. 1993) (rescission is attempt to do indirectly what cannot be done directly by injunction).[7]

Contrary to petitioner's suggestion, *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), did not hold otherwise. While this Court per-

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[6] *Tillman* v. *RTC*, 37 F.3d 1032, 1036 (4th Cir. 1994) (injunction of receivership asset sale barred); *Volges* v. *RTC*, 32 F.3d 50, 51-53 (2d Cir. 1994) (same), cert. denied, 115 S. Ct. 2618 (1995); *National Trust for Historic Preservation* v. *FDIC*, 21 F.3d 469, 470-471 (D.C. Cir.) (same), cert. denied, 115 S. Ct. 683 (1994); *Carney* v. *RTC*, 19 F.3d 950, 955-957 (5th Cir. 1994) (injunction against RTC's initiation of damages claim barred); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320, 1328-1329 (6th Cir. 1993) (rescission of asset transfer barred); *Gross* v. *Bell Sav. Bank PaSA*, 974 F.2d 403, 406-407 (3d Cir. 1992) (injunction barred even where exercise of statutory powers violates other statutory schemes); *In re Landmark Land Co.*, 973 F.2d at 290 (no injunction where receiver exercises ownership rights over failed thrift's subsidiaries); *Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d 703, 705 (1st Cir. 1992); see also *Rosa* v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 502 U.S. 981 (1991); *281-300 Joint Venture* v. *Onion*, 938 F.2d 35 (5th Cir. 1991), cert. denied, 502 U.S. 1057 (1992).

[7] See, *e.g.*, *Pyramid Constr. Co.* v. *Wind River Petroleum, Inc.*, 866 F. Supp. 513, 516 n.11 (D. Utah 1994) (rescission of RTC asset sale "clearly violates the statutory mandate of section 1821(j)"); see also *Trinsey* v. *K. Hovnanian at Upper Merion, Inc.*, 841 F. Supp. 694, 695 (E.D. Pa. 1994) (Section 1821(j) precludes rescission); *Manir Properties* v. *RTC*, Civ. A. No. 93-3271, 1993 WL 381445, at *2 (E.D. Pa. Sept. 29, 1993) (rescission of asset sale barred despite claim that sale violated first refusal right); *Harkness Apartment Owners Corp.* v. *FDIC*, Civ. No. 7080 (RJW), 1993 WL 138772 (S.D.N.Y. Apr. 26, 1993) (FDIC's power to liquidate is basic, rescission claims barred by 1821(j)), aff'd, 999 F.2d 538 (2d Cir. 1993) (Table).

mitted a challenge to action taken by the agency outside of its statutory authority, it affirmed that Section 1821(j)'s predecessor statute, 12 U.S.C. 1464(d)(6)(C) (1988),[8] "prohibit[ed] courts from restraining or affecting FSLIC's exercise of those receivership 'powers and functions' that ha[d] been granted by other statutory sources." *Coit*, 489 U.S. at 574-575. *Coit* left undisturbed uniform judicial precedent holding that Section 1464(d)(6)(C) barred collateral attack on the federal receiver's exercise of its statutory powers. See, *e.g.*, *Haralson* v. *FHLBB*, 837 F.2d 1123, 1125-1127 (D.C. Cir. 1988) ("The district court * * * recognized its lack of authority and properly declined to issue the injunction."); *Fidelity Fin. Corp.* v. *FSLIC*, 834 F.2d 741, 745 (9th Cir. 1987) (Section 1464(d)(6)(C) bars jurisdiction where receiver's asset transfer challenged); *Biscayne Fed. Sav. & Loan Ass'n* v. *FHLBB*, 720 F.2d 1499, 1503 (11th Cir. 1983) (Congress gave FHLBB "awesome amount of control and authority"), cert. denied, 467 U.S. 1215 (1984); *Gulley* v. *Sunbelt Sav. FSB*, 714 F. Supp. 819, 822 (N.D. Tex. 1989) (distribution of assets "is a basic receivership function that comes squarely within the ambit of § 1464(d)(6)(C)"), aff'd, 902 F.2d 348 (5th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); *FSLIC* v. *Hall Whispertree Assocs.*, 653 F. Supp. 148

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[8] Section 1464(d)(6)(C) provided:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

(N.D. Tex. 1986) (Section 1464(d)(6)(C) bars injunction).

3. Petitioner argues (Pet. 7) that Section 15509 of the California Corporation Code[9] cannot be preempted by 12 U.S.C. 1821(d)(2)(G)(i)(II), since the ADSB receivership predated Section 1821(d)(2)(G)(i)(II)'s enactment as part of FIRREA. Pet. 7. That is not correct.

In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court affirmed that, absent clear direction from Congress, a case will not be governed by "a federal statute enacted after the events in suit" if such application "would have a retroactive effect." *Id.* at 280. A statute has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.*

Application of those principles here is straightforward. Contrary to petitioner's view (Pet. 7), the institution of the receivership was not the relevant transaction for the purposes of retroactivity analysis in this case. Section 1821(d)(2)(G)(i)(II) authorizes the FDIC, as receiver, to "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer." For purposes of this case, then, the

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[9] Section 15509 provides that "[a] general partner shall * * * without the written consent or ratification of the specific act by all the limited partners * * * have no authority to * * * [d]o any act which would make it impossible to carry on the ordinary business of the partnership." Cal. Corp. Code § 15509(1)(b) (West 1991). Petitioner has stated that he will not consent to sale of the assets to anyone but himself. FDIC C.A. Br. 6.

relevant "events in suit" might include (i) petitioner's settlement agreement with the FDIC (which transferred all of petitioner's ownership interests in ADSB and its controlled entities to the FDIC for liquidation, except for a one percent distributive share in ADP), or (ii) the sale of the HUD Partnership interests. Both of those events post-dated enactment of FIRREA. Application of Section 1821(d)(2)(G)(i)(II) to override a consent requirement with respect to such post-FIRREA transactions is in no sense a retroactive application of the law.

In any event, even before FIRREA was enacted, transfers of receivership assets by federal banking receivers were consistently upheld despite state laws prohibiting such transfers. See *FDIC* v. *Bank of Boulder*, 911 F.2d 1466, 1473 (10th Cir. 1990) (pre-FIRREA law permitted transfer of "any assets," including letters of credit, despite Colorado general provision on transfer of letters of credit), cert. denied, 499 U.S. 904 (1991); *NCNB Texas Nat'l Bank* v. *Cowden*, 895 F.2d 1488, 1498-1499 (5th Cir. 1990) (Congress permitted transfer from receivership to bridge bank notwithstanding state law provisions preventing transfer of trustee's fiduciary responsibilities); *Valley Ranch Dev. Co.* v. *Sunbelt Sav. FSB*, 714 F. Supp. 817 (N.D. Tex. 1989) (Texas fraudulent transfer statute preempted by federal law), aff'd *sub nom. Gulley* v. *Sunbelt Sav. FSB*, 902 F.2d 348 (5th Cir. 1990), cert. denied, 498 U.S. 1025 (1991). Thus, even if prior law were applicable in this case, the result would be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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